Supreme Court, U.S.
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No. 88-2026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLEMENT J. PACYNA, PETITIONER
MSG, U.S. Army, Retired

vs.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board

---

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether military veterans should be denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers?

2. Did the district court and the court of appeals apply the correct standard of review to petitioner's within claim in light of intervening circumstances of substantial or controlling effect of this case?

CERTIFICATION

Petitioner certifies that the within petition for rehearing is presented in good faith and not for delay.

S/ Clement J. Pacyna
CLEMENT J. PACYNA

PROTEST REGISTERED

Petitioner most vigorously protests that the District Court, Western District of New York created or restructured jurisdiction to satisfy its or the government's idea, affirmed by the Court of Appeals for the Second Circuit, causing to bar this military veteran's legal claim. They have acted beyond their authority, and of The Congress, President, or an Executive Department, in violation of Constitutional and statutory provisions.

This has resulted in substantial prejudice to petitioner, affecting millions of veterans, which this Court ought to look into relative to this application.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-2026

CLEMENT J. PACYNA, Petitioner

v.

JOHN O. MARSH, JR., Secretary of the Army, et al.

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Order/Judgment of the Court of Appeals (App. A) and the Memorandum/Order of the district court (App. C) are not reported.

JURISDICTION

The Judgment of the court of appeals was entered on 10 February, 1989. The petition for rehearing, with suggestion for rehearing en banc, was denied on

13 April, 1989 (App. B). The order of this U.S. Supreme Court denying petition for a writ of certiorari was entered on 2 October, 1989 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 51 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. CONSTITUTION, Amend V provides:

   No person shall be denied due process of law.

2. CONSTITUTION, Amend XIV provides:

   No person shall be denied equal protection of law.

3. 5 U.S.C. §702 provides:

   For "Right of Review" of an agency action on a non monetary claim, where its decision is wrong.

4. 10 U.S.C. §1552 provides:

   District Courts jurisdiction to review adverse decision by board for correction of military records which is made arbitrarily, capriciously or contrary to law.

5. 28 U.S.C. §1346(a)(2) provides:

   The district courts shall have jurisdiction in any civil action or

> claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States.
>
> §1346(d) provides:
>
> That the district court shall not have jurisdiction under this section of any civil action or claim for a pension.

6. 28 U.S.C. §1361 provides:

> District courts jurisdiction for actions in the nature of mandamus to compel an officer of the United States...to perform a duty owed to the plaintiff.

7. 28 U.S.C. 1631 provides:

> Transfer to cure want of jurisdiction in the interest of justice.

STATEMENT

1. Petitioner is an Army master sergeant (pay grade E-7) who retired from active duty in 1962 after completing over 20 years of "outstanding" active military service, both in combat and as a counter-intelligence agent (66-72).[1/]

1. Indicates page(s) of appendix to petitioner's brief to the court of appeals.

2. In August 1951, while a master sergeant and serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-intelligence Corps (CIC). His immediate superiors as well as a board of review officers, first Army commanding general and the Army's surgeon general highly approved his appointment and physical qualifications, respectively (57-59).[1/]

3. In a letter, dated 22 January 1952, petitioner was notified through Army channels that he had been selected for appointment by his First Army Headquarters and that his application was forwaded to The Adjutant General (TAG) in accordance with current directives. However, TAG informed that headquarters that petitioner's appointment was not favorably considered.

Significantly the letter or notification, the only document in petitioner's

possession prior to 1979 relative to the matter, failed to contain the reason(s) for the disapproval (App. F), required by Army regulations, infra.

4. Immediately thereafter upon the denial in 1952, attempts to obtain the reason(s) for disapproval met with the Army's directive "you don't question higher authority" (56).[1/]

5. On 13 June 1980 petitioner filed an application accompanied by 31 enclosures containing substantial proof of evidence on the face of the record with the Army Board for Correction of Military Records (ABCMR), seeking reversal of the prior determination, which denied him advancement to warrant officer status, back pay, etc., pursuant to Army Regulation (AR) 15-185 (29-38)[1/] and under the provisions to recover on disability created by statute under 10 USC 1552(a) and (b). §1552 provides for correction

of military records from error or removal of an injustice, in the interest of substantial justice.

6. Petitioner's grievance, supported by substantial evidence, to the ABCMR was based on the Army's prevalent violations of its own regulations AR 600-148 (47-54)[1/] supplementing AR 610-15 (39-46),[1/] and due process rights, briefly as follows:

a. In failing to notify petitioner of the reason(s) for disapproval of his appointment (App. F), supra, the Army was in violation of AR 600-148, Section II, par. 72 and Section III, par. 9e, requiring reason(s) for disappproval.

b. In denying petitioner's request for the reason(s) for disapproval, the Army was in violation of Constitutional rights, Amend. V and XIV, requiring due process of law.

c. In violation of AR 600-148, Section II par. 5b(2), petitioner's appli-

cation when ruled upon by CIC and TAG contained neither the required request for educational waiver, with prerequisites, nor his immediate commander's comment recommending approval or disapproval with the reasons therefore. The application was complete when initialed filed and forwarded by First Army Headquarters to TAG, supra. The Army reported, indicating that the Waiver and Comment are the only documents not a matter of record (61-62).[1/]

d. In failing to return the incomplete application to petitioner, the Army was in violation of AR 600-148, Section II par. 7d, which required return of incomplete applications for completion in compliance with its provisions.

7. Notwithstanding the substantial and controlling evidence on the face of the record, supra, the ABCMR denied petitioner's application (73-74),[1/] request for reconsideration (75-82)[1/] and vigorous

appeal to the Secretary of the Army, infra.

Ironically, the ABCMR's final decision on 20 July 1982 in part states substantially: that your vigorous dissent has been noted; that there is no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952; that the denial constituted final agency action; that petitioner was not barred from asking for reconsideration upon discovery of additional substantive evidence; and that petitioner has the right to institute action in a Federal Court (App. G).

8. Siginificantly, the ABCMR in a communication, dated 3 October 1980 addressed to The Judge Advocate General (TGAG), requested that appropriate corrective administrative action be taken upon a finding of legal deficiency in the Department's denial of plaintiff's application for

appointment of warrant officer in 1952 (28).[1/] Despite the record it had reviewed, inclusive of the violations and regulations had before it, supra, TJAG reported "no legal error was found"(84).[1/]

FIRST COURT ACTION

9. On 23 February 1983, petitioner filed suit against respondent John O. Marsh, Jr. in the United States District Court for the Western District of New York. He sought an order appointing him to warrant officer, award of back pay to 1952 and increase in his retirement pension and review of the ABCMR'S final decision in 1982. He alleged that the district court's jurisdiction on the appointment, back pay and pension was based on the Tucker Act, 28 U.S.C. 1346, and review of the ABCMR'S final denial in 1982 was based on the mandamus statute, 28 USC 1361 and 10 USC 1552. He alleged that the ABCMR'S final decision was arbitrary,

capricious or contrary to law.

10. In his opinion of March 7, 1984 Judge Curtin concluded that Plaintiff's claims accrued in 1952, at the latest, 1962, and therefore were time barred under 28 USC 2401(a). He held that although the government vigorously urges that the court does not have jurisdiction under any theory, he found that there was justification under §1346. Plaintiff had waived his claim to the monetary award over $10,000.00 (App. D).

11. Judge Curtin granted the government's motion for summary judgment and dismissed petitioner's complaint. Pacyna v. Marsh, No. Civ-83-205C, 617 F. Supp. 101 (W.D.N.Y., 1984).

12. The court of appeals for the federal circuit affirmed the decision. Pacyna v. Marsh, No. 86-1488, 809 F.2d 792 (1986).

13. Petitioner's petition for a writ of certiorari was denied by the U.S.

Supreme Court. Pacyna v. Marsh, No. 86-1136, 107 S.Ct. 3278 (1987).

SECOND COURT ACTION

14. On 10 December 1987, petitioner commenced the instant suit in the United States District Court for the Western District of New York.

15. The instant suit soley sought judicial review of the ABCMR'S final decision on 20 July 1982 on a non monetary claim for alleged agency wrong, pursuant to "Right of Review" conferred by statute 5 USC 702, the mandamus statute 28 USC 1361, and 10 USC 1552, supra.

16. Petitioner's ground for the suit was predicated on "Right of Review" of a wrong committed by the agency's or ABCMR"S final decision accrued in 1982, not 1952 or at the latest 1962 alleged by the prior court and agreed upon by the second court, and therefore it was not subject to the statute of limitations. Also, that al-

though the claim had been presented in the prior action it was not litigated.

17. In his opinion of 14 August 1988, Judge Elfvin specifically stated in part that a similar, if not identical, complaint was dismissed by John T. Curtin of this United States District Court on grounds that it was barred by the applicable six years statute of limitations for actions against the United States. Pacyna v. Marsh, 617 F. Supp. 101 (W.D. N.Y., 1984), supra. That the defendants now move to dismiss the Complaint on the grounds of the applicable statute of limitations, res judicata and lack of subject matter jurisdiction. Judge Elfvin concluded that the claim was barred by res judicata. Accordingly he Ordered that the defendants' motion to dismiss the Complaint is granted and the Complaint is dismissed with prejudice (App. C).

18. The court of appeals for the second

circuit affirmed the decision. Pacyna v. Marsh, et al, No. 88-6230 on 10 February 1989 (App. A). Petitioner in his appeal for rehearing, with suggestion for en banc hearing, sought relief for the first time from a fatal jurisdictional defect existing in the prior proceedings hereto had herein. His petition for rehearing en banc was denied on 13 April 1989(App.B).

19. The basis for federal jurisdiction in the district court is found in 5 USC 702, 10 USC 1552 and 28 USC 1361.

ARGUMENT

PETITIONER SHOULD NOT BE DENIED JUDICIAL REVIEW OR BE BARRED BY RES JUDICATA WHEN SEEKING ONLY EQUITABLE RELIEF FOR CONSTITUTIONAL, STATUTORY, OR REGULATORY VIOLATIONS COMMITTED BY HIS SUPERIOR OFFICERS, WHEN: (1) THE SUIT IS TIMELY FILED; (2) THE CLAIM WAS NOT LITIGATED IN THE PRIOR ACTION; (3) THE CLAIM IS CONFERRED BY STATUTE AND NO STATUTE PROHIBITS RELIEF; AND (4) A FATAL JURISDICTIONAL DEFECT EXISTS AT THE OUTSET OF THE LAW SUIT.

Petitioner vigorously contends that this Court seriously erred in denying

his writ of certiorari, having overlooked or misapprehended intervening circumstances of substantial or controlling effect of this unique case, infra.

The second district court or Judge Elfvin's decision barring suit by res judicata, affirmed by the court of appeals is simply seriously erroneous as a matter of law.

Petitioner's instant claim was soley for review of the ABCMR'S final decision in 1982, conferred by statutes, which was not litigated in the prior action, supra, infra. While the first district court or Judge Curtin's decision, which is flawed, infra, barred suit by the six year statute of limitations on a claim primarily seeking an order for appointment and pension accrued in 1952, supra, infra.

Judge Curtin created or restructured jurisdiction to satisfy his or the government's idea, by barring petitioner's suit

for which the court had no jurisdiction under §1346. Significantly, Judge Curtin made no determination on petitioner's equitable claim, whether the ABCMR'S final decision in 1982 was improper or not, for which claim there is jurisdiction and the claim is conferred by statutes, supra, infra.

Judge Curtin substantially ruled, although erroneously, that petitioner could not revive him 1982 claim where the 1952 claim was barred by the statute of limitations, finding that there was jurisdiction under §1346 since plaintiff had waived his claim to any monetary award over $10,000.

Therefore, Judge Curtin seriously erred as a matter of law, causing substantial prejudice and denial of justice to petitioner, for reasons as follows:

1. §1346(a)(2) provides that district courts shall have original jurisdiction

concurrent with the Court of Claims, of:

"Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States".

Since petitioner sought an order to appoint him, he had no claim founded under the requirements under §1346(a)(2), and therefore he could not benefit from, or sue, or waive the $10,000 in amount, for, a position of warrant officer not had by him, supported by case law, infra.

2. §1346(d) clearly provides that the district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

Therefore, having no power to grant the defendant summary judgment, Judge Curtin was required to dismiss, not bar on the statute of limitations, the monetary claim for lack of jurisdiction under §1346(a)(2)&(d), and was required to li-

tigate the equitable Claim for review of the ABCMR'S action, which he did not do, but for which he had jurisdiction, infra.

Case opinions directly to the point, in this case, respectively, are as follows:

1. The U.S. Supreme Court in United States v. Testan, 424 U.S. 392, 396, 402 (1976), remanded case with directions to dismiss suit, holding:

"The dissent argued that the jurisdiction of the Court ... is limited to money judgments and, since none had been or could be ordered in this case, the court was without jurisdiction". " In addition the respondents had not stated a claim upon which relief could be granted, for they were asking for positions, and pay, to which they had never been appointed. The dissent further argued that there is no constitutional right to a government position to which one has not been appointed; that the salary of a Government job is payable only to the person appointed to that position; and that the court had no authority to take over the appointing power that the Constitution, Art. II, §2, has placed in the Executive Department."

"The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct.

Cl. 183, 186, 376 F.2d 900, 902 (1967)."

2. The U.S. Supreme Court in Orloff v. Willoughby, 345 U.S. 83,90 (1953), held:

"The President commissions all Army officers, 5 U.S.C. §11. We have held that, except one holds his appointment by virtue of a commission from the President, he is not an officer of the Army. United States v. Mouat, 124 U.S. 303. Congress has authorized the President alone to appoint Army officers in grades up to an including that of colonel, above which the advice and consent of the senate is required. 55 Stat. 728, as amended, 57 Stat. 380."

" It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions."

3. The Court of Appeals for the District of Columbia in Van Drasek v. Lehman, 762 F.2d 1065, 1985, held:

"As explained in greater detail below, for a claim in the district court to be based on the Tucker Act, it must (1) seek money (2) not exceeding $10,000 (3) from the United States and (4) be founded either upon a contract or upon a provision of "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. §1346(a)(2), that

can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." United States v. Mitchell, 463 L.Ed2d 580 (1983). If any of these requirements are not met, the claims falls outside the scope of the Tucker Act, and this court would retain appellate jurisdiction over the entire case."

4. The Court of Appeals for the 2d Circuit and 5th Circuit in Goldstone v. Payne, 94 F.2d 855 and in Mason v. Hitchcock, et al, 108 F.2d 134, substantially Ordered, respectively:

"The judgment of the District Court is vacated and the case is remanded to that court with direction to dismiss the cause for want of jurisdiction", finding that: Jurisdiction over the subject matter in the district court if not conferred by law cannot be created by the parties", and that "Consent or waiver of the parties, even by appearance in court or going to trial, can never confer jurisdiction upon a federal court."

II —

THE DISTRICT COURT AND COURT OF APPEALS DID NOT APPLY THE CORRECT STANDARD OF REVIEW TO PETITIONER'S EQUITABLE CLAIM AFFORDED VETERANS BY OTHER COURTS, IN LIGHT OF THE INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT GRAPHICALLY ILLUSTRATED ABOVE & BELOW.

For the reasons aforementioned, the first district court or Judge Curtin's

decision, affirmed by the court of appeals, on a monetary claim, is jurisdictionally defective.

With respect to petitioner's claim for equitable relief, the instant district court and court of appeals' decisions are flawed for two (2) reasons, as follows:

1. The prior district court or Judge Curtin did not litigate petitioner's claim for judicial review seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by his superior officers, even though suit is timely filed and the claim for review of the ABCMR'S final decision accrued in 1982, and the claim is conferred by statute § 702, §1361 and §1552, supra, and there is no statute to preclude review.

The petitioner's claim supported by clear , convincing and substantial evidence on the face of the record herein, is that the ABCMR'S final decision, supra is

arbirary, capricious, or contrary to law, in light of the prevalent Constitutional, statutory, or regulatory violations committed against him by his superior officers, in denying him an appointment to warrant officer in 1952.

The record is absent a ruling by any court whether or not the ABCMR'S final decision in 1982 is or was improper or not.

Petitioner's claim is supported by numerous case authorities, which hold, in the interest of justice, that veterans cause of action for judicial review or corrective relief accrued at the date of the military correction board's final decision (1982), not the date of the alleged error or injustice occurred at time of service. 2/

2. See: Uhley v. United States, 121 F. Supp.674; Yagjian v. Marsh, 571 F.Supp. 698; Kaiser v. Sec. of Navy and Board for Correction of Military Records, 525 F. Supp. 1226; Mulvaney v. Stetson, 470 F. Supp. 725; Ashe v. McNamara, 355 F.2d 277; Nolen v. Schlesinger, 492 F.2d 787; Hamlin v. United States, 391 F.2d 941; and Wood v. Sec. of Defense, 496 F. Supp 192 (1980).

Accordingly, his prior and instant suit filed in 1983 and 1987 on a claim accrued in 1982, occurring within the six years of the filing, respectively, supra, are not barred by the six years statute of limitation.[2/]

As petitioner's case contains Army violations clearly presented on the record, supra, numerous case authorities hold that when a military correction board fails to correct an injustice clearly presented in the records before it, it is acting in violation of its own mandate, and such a violation, contrary to the evidence is arbitrary or capricious.[3/]

A significant case dealing directly to the point in this case, is the U.S. Supreme Court opinion in Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 141

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3. See: Yee v. United States, 512 F.2d 1383; Hall v. Fry, 509 F.2d 1105 and Austin v. United States, 393 F.Supp. 291.

(1967), which granted certiorari, reversed and remanded, holding:

"the Administrative Procedure Act, which embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, "5USC §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 USC §701(a). The Administrative Procedure Act provides specifically not only for review of "(a)gency action made reviewable by statute" but also for review of a "final agency action for which there is no other adequate remedy in a court, "5 USC §704."

"Again in Rusk v. Cort, 309 U.S. 367, 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review."

2. In light of the jurisdictional defect on the monetary claim, and the equitable claim was not litigated, in the prior action, the instant district court and the court of appeals affirmation barring suit by res judicata, is legal error and not in keeping with public policy and case authorities with respect to the ap-

plication of res judicata, as follows:

a. As the prior district court lacked subject matter jurisdiction at the outset of the lawsuit, supra, all decrees, judgments, orders, etc., of that court and, for that matter, all appellate decisions in the action are a nullity (Federal Courts Key 542, Judgments Key 16). See Air Transport Assn. v. PATCO, 516 F. Supp. 1108, Affirmed 667 F.2d 316, Ruddies v. Auburn, 261 F. Supp. 648.

b. The Court of Appeals, 5th Circuit, in Dore v. Kleppe, 522 F.2d 1369, which reversed and remanded, held:

> "Key to deciding whether res judicata applies is a determination of whether second suit involves the same cause of action as the prior litigation; if the cause of action is different in the second suit the parties are estopped from relitigating only those issues actually and necessarily decided in the first suit. Res judicata is a principle of public policy and should be applied as to give rather than deny justice."

c. The CA 7th Cir., 1980, in International Harvester v. OSHRC, 628 F.2d 982,

which reversed and remanded, held:

"Action against company ... was not barred by res judicata, since in both prior actions ... the issue was not litigated or decided on its merits."

d. Findings, whether military Correction Board acted improper or not, were made in dealing with res judicata in Blevins v. Orr, 721 F.2d 1419 (D.C. Cir., 1983); Tucker v. Department of the Army, 447 F. Supp. 1207, 193 U.S. App. D.C.218; and Hardison v. Alexander, 655 F.2d 1281 (D.C. Cir., 1981)citing Dilley v. Alexander, 603 F.2d 914 (D.C. Cir., 1979).

In Dilley v. Alexander, supra the court reversed, holding:

"As judge MacKinnon speaking for this court in Dilley, concluded:", "It is the duty of the federal courts to inquire whether action of a military agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations governing that agency". "It is to this limited but critical inquiry that we now turn."

Petitioner contends that a ruling, where court lacks subject matter jurisdiction at the outset of a lawsuit, such

as happened in this case, is a decision not on the merits for res judicata purposes.

At a minimum this Court should Order:

1. The district Court or Judge Curtin's March 7, 1984 Order/Judgment of dismissal under §1346 barring suit on the monetary claim under §2401(a), vacated on grounds od lack of jurisdiction, and remand the equitable claim for review of the ABCMR'S final decision on July 20, 1982;

2. The court of appeals for the federal circuit's November 13, 1986 Order/Judgment of affirmation, vacated;

3. The district court or Judge Elfvin's August 14, 1988 Order/Judgment, barring suit by res judicata, vacated.

4. The court of appeals for the second circuit's February 10, 1988 Order/Judgment of affirmation, vacated; and or

5. This Court, in connection with the

above, as the appellate Court, should remand this case on the equitable claim to the ABCMR on grounds that its final decision of July 20, 1982 is arbitrary, capricious, contrary to the evidence presented and contrary to law; and

Petitioner prays for such other and further relief as may be just and proper.

From the foregoing it is clear that the appeals courts have so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such departure by the district courts and have decided an important question of Federal law affecting millions of veterans which has not been, but should be, settled by this Court.

It is also clearly evident from the foregoing, that this Court's denial of peti-

tioner's appeal for a writ of certirari (App. E), is arbitrary, capricious and contrary to Constitutional and statutory provisions, and is in conflict with its own opinions and decisions and the decisions of other federal courts on this matter, aforementioned.

CONCLUSION

For the foregoing reasons the petition for rehearing for a writ of certiorari should be granted.

Respectfully submitted.

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Dated: October 18, 1989

APPENDICES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of February, one thousand nine hundred and eighty-nine.

Present: Honorable J. Edward Lumbard,
Honorable Amalya L. Kearse,
Honorable Ralph K. Winter,
Circuit Judges.

No. 88-6230

CLEMENT J. PACYNA,
MSG, U.S. Army Retired
Plaintiff-Appellant

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States

District Court for the Western District of New York, and was submitted by Plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREFORE, it is hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby affirmed substantially for the reasons stated in the Memorandum and Order of Judge John T. Elfvin dated August 14, 1988.

/s/J. EDWARD LUMBARD
J. Edward Lumbard, U.S.C.J.

/s/AMALYA L. KEARSE
AMALYA L. KEARSE, U.S.C.J.

/s/RALPH K. WINTER
RALPH K. WINTER, U.S.C.J.

Filed FEB 10 1989

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of April, one thousand nine hundred and eighty-nine. No. 88-6230

FILED April 13, 1989

CLEMENT J. PACYNA,
MSG, U.S. Army retired,
Plaintiff-Appellant,

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATTHEWS, in his capacity as Executive Secretary of the Board.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, CLEMENT J. PACYNA, pro se.

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing is denied.

It is further noted that the suggestion

for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CLEMENT J. PACYNA,
MSG, U.S. Army Retired,
Plaintiff,

v.

JOHN O. MARSH, JR., in his capacity as Secretary of the Army, Army Board for Correction of Military Records, and JOHN W. MATHHEWS, in his capacity as Executive Secretary of the Board,
Defendants.

MEMORANDUM DECISION
CIV-87-1531E

This is an action seeking judicial review of a final decision of the Army Board for Correction of Military Records ("the Board"). The plaintiff, acting pro se asks this Court to correct his military records to reflect his appointment to Warrant Officer in the United States Army which appointment was denied by the Army in 1952. The defendants now move to dismiss the Complaint on the grounds of the applicable statute of limitations, res judicata and lack of subject matter jurisdiction.

A similar, if not identical, Complaint

was dismissed by Judge John T. Curtin of this United States District Court on the grounds that it was barred by the applicable six-year statute of limitations for action against the United States.[1] Pacyna v. Marsh, 617 F.Supp. 101, 102 (W.D.N.Y., 1984). In that action the plaintiff had named only Secretary of the Army John O. Marsh, Jr. as a defendant and had sought to have his records corrected to reflect his appointment to Warrant Officer and also that his retirement pay be increased to reflect such appointment. Complaint, Pacyna v. Marsh, supra (Civ. No. 83-205C), Exhibit A to Donald P. Simet, Esq. Affidavit (sworn to February 5, 1988). Judge Curtin held that the cause of action had accrued in 1952 when the plaintiff's application for promotion had been denied and

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1. 28 U.S.C. §2401(a) provides that "Every civil action commenced against the United States shall be barred unless the Complaint is filed within six years after the right of action first accrues."

that his action therefore was barred by the six-year statute of limitations.[2]

Judge Curtin was underwhelmed by the plaintiff's contention -- the same contention as is made here -- that the right of action did not accrue until 1982 when his records were denied, and held that the plaintiff could not revive his claim by applying to the Board in 1981 and 1982 and contending that its current adverse decision created anew his cause of action. Pacyna v. Marsh, supra, at 103. Accordingly, the defendant Marsh's motion for summary judgment dismissing the Complaint was granted by Judge Curtin. This decision was affirmed by the United States Court of Appeals for the Federal Circuit. Pacyna v. Marsh, 809 F.2d 792 (1986). cert denied,

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2. Judge Curtin found that, even if the statute of limitations had been tolled while the plaintiff was on active duty pursuant to the Soldiers and Sailor's Civil Relief Act of 1940, 50 U.S.C. App. §501 et seq., his claim would have accrued upon his retirement in 1962. Pacyna v. Marsh, supra, at 102.

___U.S.___, 107 S.Ct. 2177, reh-g denied, ___U.S.___, 107 S.Ct. 3278 (1987); Exhibit D to Simet Affidavit.[3]

The plaintiff maintains that the instant action is not barred by the doctrine of res judicata inasmuch as it is soley an action for review of the new decision by the Board, whereas his earlier action was one for monetary damages. This contention is wholly without merit. Both actions request the same relief -- viz., the correction of his military records to reflect an appointment to the rank of Warrant Officer. The factual allegations in both complaints are vitually identical; it appears that the plaintiff copied the in-

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3. The United States Court of Appeals for Federal Circuit held that the cause of action had accrued in 1952 and that the plaintiff's contention that the Court must review the Board's 1981 and 1982 decisions concerning a matter that accrued 31 years before this action was commenced was contrary to law. Copy of Unpublished Opinion, Pacyna v. Marsh, 809 F.2d 792 (1986) (per curiam), Exhibit D to Simet Affidavit.

stant complaint from the previous one which had been prepared by an attorney. The only distinctions are the way the claim for relief is phrased and the addition of another defendant. These distinctions do not change the fact that the plaintiff is again attempting to get judicial review of the same old decision by the United States Army.

The doctrine of res judicata is well established and its basic principles are familiar. "(A) valid, final judgment on the merits bars a second action by the same plaintiff or his privy against the same defendant or his privy, on the same cause of action***." 1B J. Moore, J.D. Lucas & T. Currier, Moore's Federal Practice 10.411(2), p. 396 (2d ed 1984); see also N.L.R.B. v. United Technologies Corp., 706 F.2d 1254, 1259 (2d Cir. 1983). An earlier judgment precludes subsequent litigation of issues actually decided in the

first action and of issues that could have been raised therein but were not, ibid.; Browning Debenture Holders' Com. v. DASA Corp., 605 F.2d 35,39 (2d Cir. 1978), as long as the two actions arise from the same transaction or series of transactions. See Isaac v. Schwartz, 706 F.2d 15, 17 (1st Cir. 1983).

Minor semantic distinctions can not allow the plaintiff to escape the doctrine of res judicata. The fact that the plaintiff named an additional defendant -- i. e., John W. Matthews -- does not save the Complaint. "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402,403 (1940).

The plaintiff asks this Court to allow

him to do that what was earlier held he could not do -- i.e. obtain judicial review of a decision that was made 36 years ago.

Accordingly, it is hereby ORDERED that the defendants' motion to dismiss the Complaint is granted and the Complaint is dismissed with prejudice.

Dated: Buffalo, N.Y.
August 14, 1988

/s/ JOHN T. ELFVIN
U.S.D.J.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MEMORANDUM DECISION
CIV-83-205C

CLEMENT J. PACYNA,

Plaintiff

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

In this case, plaintiff seeks review of a final decision of the Secretary of the Army. Defendant moves to dismiss on the ground that plaintiff has failed to state a claim and, in the alternative, for summary judgment. The basis for these motions is lack of jurisdiction, statute of limitations, and laches.

The history of this litigation is a long one. It began in 1951, when plaintiff was serving as a master sergeant and applied for an appointment as a warrant officer in the Counter-intelligence Corps (CIC). Although he received approval from his local

commanders, on January 3 (sic), 1952, he was informed that his application did not receive final approval.

Plaintiff continued in military service until 1962, when he retired from the Army with the status of "retired reserve." Nothing occurred after that until February of 1979, when plaintiff made an application through the Freedom of Information Act and examined his personnel file.

On June 13, 1980, plaintiff filed an application with the Army Board for Correction of Military Records (ABCMR), seeking to have his 1952 promotion denial reversed and his records corrected accordingly. Plaintiff claims that his application was timely because it was filed within three years after he discovered the error in his record. In the fall of 1980, the ABCMR solicited and obtained an advisory opinion from the Office of the Judge Advocate General. A copy of the opinion, which re-

commended that plaintiff's claim be denied, was sent to him for his comment. Plaintiff responded in February of 1981.

After considering plaintiff's response, the Board concluded that plaintiff had not given any reason to explain why the action not to appoint him was illegal or in violation of regulations. The Board also held that his failure to timely file his application had made efforts by the Army to investigate his claim difficult. Because of his 28-year delay in challenging the decision made in 1952, only limited documentation is available. This decision was affirmed by the Secretary of the Army on June 7, 1982. Plaintiff's suit followed in February, 1983, with plaintiff claiming that failure to appoint him as a warrant officer was an abuse of discretion and a violation of his rights. He seeks an order of the court appointing him to the rank of warrant officer and retirement pay, including back

payment to the time of the initial denial.

Assuming for the moment that this court has jurisdiction, it is clear that plaintiff's claim is barred by the statute of limitations. 28 U.S.C. §2401(a) provides that a civil suit against the United States must be commenced within six years after the right of action first accrues. The statute may not be waived in actions against the United States. United States v. Kubrick, 444 U.S. 111 (1979). "(A) cause of action is deemed to have accrued when facts exist which enable one party to maintain an action against another." Konecny v. United States, 388 F.2d 59, 65 (8th Cir. 1967), quoting Great American Ins. Co. v. Louis Lesser Enterprises, Inc. 353 F.2d 997, 1001 (8th Cir. 1965).

The file in this case was complete in 1952, when plaintiff's application for promotion was rejected. Plaintiff argues that he was not able to obtain the facts

until he looked at his personnel file through a Freedom of Information Act Procedure in 1979, but there was no reason why he could not have reviewed his personnel records at an earlier date. Even if the statute of limitations was tolled during the period plaintiff remained on active duty, pursuant to the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S. C. App. §501 et seq., his cause of action would have accrued upon his retirement in 1962.

Cases such as Kaiser v. Secretary of the Navy, 525 F.Supp 1226 (D. Col. 1981), cited by Plaintiff in support of his application, do not apply here. The statute of limitations did not apply in Kaiser, because the nature of the relief sought in that case was to correct a discharge from dishonorable to honorable. In that type of case, or cases in which the applicant seeks to expunge the judgment of a court martial,

the statute of limitations is not a bar. However, in cases like the present one where the relief sought is money, the statute of limitations is a bar if the case is untimely filed. In this case, the plaintiff wants his records corrected and, at the same time, he wants the government to increase his retirement pay.

Plaintiff cannot revive his claim by applying to the ABCMR in 1981 and claiming that the 1982 decision revived the jurisdictional statute. To do this would permit a plaintiff to have the power to avoid the jurisdictional bar every time he submitted an application which was considered by the Board. Thus, whether his claim accrued in 1952 or at the time of his retirement in 1962, the time to institute the suit has long passed.

Although the government vigorously urges that the court does not have jurisdiction under any theory, I find that there is

jurisdiction under 28 U.S.C. §1346. Plaintiff has waived his claim to any monetary award over $10,000.00.

Defendant's motion for summary judgment is granted, and the complaint is dismissed.

So ordered.

/S/ JOHN T. CURTIN
USDJ

Dated: March 7, 1984.

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 2, 1989

Mr. Clement J. Pacyna
1151 Wehrle Drive
Williamsville, NY 14221

Re: Clement J. Pacyna v. John O. Marsh, Jr., Secretary of the Army, et al.
No. 88-2026

Dear Mr. Pacyna:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

S/ JOSEPH F. SPANIOL, JR.
T/ Joseph F. Spaniol, Jr.,
Clerk

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HEADQUARTERS FIRST ARMY
GOVERNORS ISLAND, NEW YORK 4, N.Y.

AHFAG-MP 201 Pacyna,Clement J. 22 JAN 1952

SUBJECT: Temporary Appointment as Warrant Officer

THRU: Commanding Officer
108th CIC Detachment
Boston Army Base
Boston, Massachusetts

TO: M/Sgt Clement J. Pacyna, RA20275571

1. Your application for temporary appointment as warrant officer was received at this headquarters and you were tentatively selected for appointment. Your application was forwarded to The Adjutant General in accordance with current directives.

2. The Adjutant General has informed this headquarters that your appointment as warrant officer, junior grade, Army of the United States in Counter-intelligence career warrant is not favorably considered.

BY COMMAND OF

LIEUTENANT GENERAL CRITTENBERGER:

/S/JEROME L. BAES
JEROME L. BAES
1st Lieut, AGC
Asst Adj Gen

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310
20 Jul 1982

SFMR

Mr. Timothy R. Lovallo, Esq.
950 Ellicott Square Building
Buffalo, New York 14203

Dear Mr. Lovallo:

This is in reply to your letter of 7 July 1982 to the Deputy Assistant Secretary concerning the case of Master Sergeant Clement J. Pacyna, 106-05-7846, United States Army Retired.

Your vigorous dissent has been noted. However, all evidence currently of record clearly indicates that there was no material error or injustice in the Department's denial of Sergeant Pacyna's application for appointment as a warrant officer in 1952.

Please be advised that within the Department of Defense, the authority to effect the change you seek in Sergeant Pacyna's records can be exercised only through the

Board for Correction of Military Records. Accordingly, there is no higher administrative appeal within the Department of Defense.

Should you discover additional substantive evidence not previously submitted, you may ask for reconsideration of Sergeant Pacyna's case. Otherwise this letter constitutes final agency action on his request for correction of military records. However, if you desire additional review of the Board's actions, then you have the right to institute action in a Federal court of competent jurisdiction.

Sincerely,

/s/JOHN W. MATTHEWS
JOHN W. MATTHEWS
Executive Secretary
Board for Correction
of Military Records